

## HUMAN SERVICES BOARD

# INTRODUCTION

## FINDINGS OF FACT

1. The petitioner is the grandmother of a now-five-year-old girl. In April 2008 the Department received a report that the petitioner had hit her granddaughter with a flyswatter. In a decision dated July 7, 2008 the Department affirmed its decision to substantiate the incident as child abuse.

2. The Department's investigator testified that on April 22, 2008, following a report from the girl's preschool, she interviewed the petitioner's granddaughter at the preschool. The interviewer observed that the girl had a "red welt" on her upper arm, and that the welt had a "mesh pattern" that was "square".

3. The investigator then interviewed the petitioner. The petitioner admitted that she had hit her granddaughter with a flyswatter two days before. The petitioner maintained that she and her granddaughter were "horsing around" with the flyswatter, lightly hitting each other on the buttocks, and that she had accidentally hit her granddaughter on the arm when the girl had suddenly swung around. The petitioner's testimony at the hearing was consistent with what she told the investigator.

4. There were no other witnesses to the incident. The Department maintains that the girl initially told her teachers at preschool and the Department investigator that the petitioner had been disciplining her with the flyswatter. However, the girl's family did not make the girl available to testify at the hearing, and the Department did not choose to attempt to compel her appearance through a subpoena.

5. The Department does not dispute that other family members, including the child's mother (the petitioner's daughter), have consistently supported the petitioner and do not believe that the petitioner intentionally hit her granddaughter. The Department also does not dispute the proffered testimony of family members at the hearing that they have never observed the petitioner hitting any of her children or grandchildren.

6. It may be difficult to reconcile the petitioner's claim of a light swat during horseplay with the fact that two days later an observable welt in the shape and pattern of a flyswatter remained on her granddaughter's arm. At the hearing the petitioner appeared to be physically ill, but her demeanor did not convince the hearing officer that she was being entirely truthful in her version of the events in question. However, the Department presented no medical evidence that the injury in question was unlikely to have been caused by the circumstances described by the petitioner.

ORDER

The Department's decision is reversed.

REASONS

The Department is required to investigate reports of child abuse or neglect and to maintain a registry with the names and records of those who are determined to have a "substantiated" finding of abuse or neglect. 33 V.S.A. § 4913 and 4916. A report is substantiated when it is "based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912(10).

Any person against whom a report of abuse is substantiated by DCF may appeal to the Human Services Board. In such cases the burden of proof is on the Department. 33 V.S.A. § 4916b.

The statute at 33 V.S.A. § 4912 defines abuse and neglect, in pertinent part, as follows:

- (2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare . . .
- (3) "Harm" to a child's health or welfare can occur when the parent or other person responsible for his welfare:
  - (A) Inflicts, or allows to be inflicted, upon the child, physical or mental injury . . .
- (6) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any

bodily organ or function by other than accidental means. . .

The Department maintains that its "policy" regarding "disfigurement" includes bruises that remain more than twenty-four hours after a reported injury. Be that as it may, in this case the Department presented no medical evidence that the observable injury to the child was unlikely to have been accidentally inflicted and was more likely to have resulted from excessive force. Therefore, it must be concluded that the Department has not met its burden of proof, and its decision substantiating the report of child abuse in question must be reversed.

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